Office-Supreme Court, U.S.
FILED
JAN 27 1964
JOHN F. DAVIS, CLERK

No. 479

IN THE

Supreme Court of the United States

October Term, 1963

EDWARD EARLE BECK, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR REHEARING OF THE ORDER DENYING A WRIT OF CERTIORARI

WILLIAM F. WALSH
1955 Richmond Avenue
Houston, Texas 77006
Counsel for Petitioner

Alpha Law Brief Co., 402 M & M Bldg., Houston 2

No. 479

IN THE

Supreme Court of the United States

October Term, 1963

EDWARD EARLE BECK, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING OF THE ORDER DENYING A WRIT OF CERTIORARI

Additional Question Presented

Whether a United States District Judge who has personal knowledge of critical information bearing on the credibility of a key prosecution witness in a criminal case retains jurisdiction to preside in spite of the mandatory provision of 28 *U.S.C.* 455 that, "Any . . . judge of the United States shall disqualify himself in any case in which he . . . is or has been a material witness . . ."

Additional Reasons for Granting the Writ

1. Section 455, Title 28, *United States Code*, provides:

> "Any . . . judge of the United States shall disqualify himself in any case in which he . . . is or has been a material witness . . ."

2. When a judge falls within the provisions of this statute, he has no discretion to continue to preside. He has a mandatory duty to withdraw from the case. "The word 'shall' is ordinarily 'the language of command'" *(Anderson v. Yungkau*, 329 U.S. 482, 485) imposing a mandatory duty when the ends and aims to be achieved affect fundamental rights *(Escoe v. Zerbst*, 295 U.S. 490, 493). The words "shall be allowed" mean ". . . 'must be allowed' when asked for by one who stands in such relation to the cause that he can demand it." *(Ex Parte Jordan*, 94 U.S. 248, 251). " 'Shall' ought undoubtedly be construed as meaning 'must' for the purpose of sustaining or enforcing an existing right . . ." *(West Wisconsin R. Co. v. Foley*, 94 U.S. 100, 103).

3. Since the tenor of her conversations with the district judge would have borne on her credibility, the judge became a material witness himself. As Judge Medina told one jury:

> "A material fact includes a fact bearing on the credibility of the witness, as well as those bearing directly on the issues in this case." *United States v. Foster*, 9 F.R.D. 367, 389.

4. Jurisdiction is "lost in the course of the proceedings" *(Frank v. Mangum*, 237 U.S. 309, 327; *Johnson v. Zerbst*,

304 U.S. 458, 468) if fundamental considerations of fairness are ignored.

Twice, this Court has found it necessary to reverse criminal convictions because cross-examination about clemency expectations was curtailed (*Alford v. United States*, 282 U.S. 687; *Gordon v. United States*, 344 U.S. 414). It is child's play to eradicate these opinions if the prospects the witness expects to enjoy may be concealed from the cross-examiner.

The jury's power to evaluate a witness fairly is destroyed if a judge may assure the jury that he has tested the merits of a plea of guilty (R. 484), even though the judge knows that the witness is actively campaigning to secure her freedom by maintaining her innocence (after careful "explanations" by her lawyers concerning "intent and knowledge"—R. 584-585, 598-599). We respectfully contend that when the trial judge's private knowledge of his own conference with the prosecution's "star witness" became material during the course of this trial, he had a duty to tender himself to the defense as a witness and to disqualify himself from further control over the proceedings—that he was without jurisdiction to proceed as a judge.

We feel that we do not exaggerate when we say that this case raises crucial issues in the administration of justice. In the very nature of things, certain facts will be known only to the trial judge, as when he confers privately with a key witness. Section 455 of the Judicial Code is designed to protect the parties by placing the burden on the judge to disclose his prior information and to disqualify himself.

Certainly that burden is not satisfied when:

1) a witness pleads guilty in public; and

(2) then privately meets with the judge to assert her innocence;

(3) when the meeting leads the judge to approve dismissal of all charges against the witness; but when the judge, nevertheless,

(4) assures that jury that he satisfied himself the guilty plea was justified (R. 484) and then, as part of his formal instructions to the jury, lends the weight of his office to the theory that, "It might well be that both the Defendant Beck and Miss Watkins knew about the marijuana in her hair . . ."*

(5) just before dismissing the case against Miss Watkins, on the footing that Miss Watkins did **not** know the marijuana was in her hair.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted as to the questions presented both in the original petition and in this petition for rehearing.

Respectfully submitted,

WILLIAM F. WALSH
1955 Richmond Avenue
Houston, Texas 77006
Attorney for Petitioner

*This quotation from the charge to the jury appears at about the middle of the judge's instructions. We have a copy of the charge, but the page numbers do not match the pagination of the record. The Clerk is prohibited from loaning the record to us at this stage of the proceedings.

Certificate of Good Faith

I certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to a substantial ground available to Petitioner and not previously presented.

WILLIAM F. WALSH

Certificate of Service

I certify that five copies of this Petition were mailed to the Solicitor General, Department of Justice, Washington 25, D.C., air mail postage prepaid, this 24th day of January, 1964.

WILLIAM F. WALSH